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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 522

KATHERINE MACDONNELL,
Petitioner,

vs.

BANK OF AMERICA (a National Trust and Savings Association),
CORPORATION OF AMERICA (a corporation),
CAPITAL COMPANY (a corporation), formerly known as
CALIFORNIA LANDS INC. (a corporation),
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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BRIEF IN SUPPORT THEREOF.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit entered in the above entitled cause on July 27, 1942.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is cited in the transcript of record. (Pages 2159 to 2188.)

The opinion of the District Court is cited in the transcript of record. (Pages 151 to 155.)

JURISDICTION.

The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. Rehearing was denied on September 14, 1942. (Tr. 2189.)

STATEMENT OF THE CASE.

There are two (2) actions brought by Petitioner against the three (3) defendants.

Specific performance action.

On February 25, 1931, the Petitioner, paid to one James Glines, manager of the branch office of the

Bank of America, N. T. S. A., at Santa Maria, California, a deposit of $350.00, who agreed in writing, to sell to her the "Brass Ranch," the real property involved in this suit, for the sum of $7,000.00; $700.00 total down payment, and the balance on installments at the rate of $50.00 per month. Petitioner paid the final and last payment on May 27, 1938, but the respondents refused to give her a deed in fee simple to said land.

Respondents contend that there was another agreement to sell, not the "Brass Ranch" but the southeast quarter (S. E. ¼) of the northeast quarter (N. E. ¼) of Sec. 28, Township 10, North, to Petitioner under date of February 28, 1931, or three days later than Petitioner contends the agreement was made; also that the said respondents did not agree to sell the land to Petitioner in fee simple, but that under their agreement they reserved to themselves all the "oil, gas and mineral rights." They further contend that they only agreed to sell to her the "Surface Rights" of the Southeast Quarter of the Northeast Quarter of Section 28, Township 10, North.

Respondents also say that they "delivered a deed" to Petitioner on March 10, 1931, which deed contained the phrase "excepting all gas, oil and mineral rights." Petitioner takes the position that they NEVER LEGALLY DELIVERED THE DEED to her at any time and she did not know of such reservation until sometime during the year 1937.

Damage for trespass action.

On February 28, 1938, one of the above named defendants, the California Lands Inc., entered upon Petitioner's land and commenced the erection of an oil derrick, construction of oil storage tanks, roads, power lines, pipe and oil lines, gas and water lines, digging sump holes, destroying her surface and crops, tearing down fences, trees and survey monuments. That shortly thereafter they brought in a flowing oil well with an approximate daily capacity of 2,200 barrels of oil per day. That the California Lands Inc., refused to pay Petitioner any damage for their unlawful actions to her land and have now taken ALL of the "Brass Ranch" for their oil development purposes, thus destroying the entire surface rights of Petitioner, without making restitution therefor, or making any arrangements to pay to her the usual landowner's royalty or sufficient damages.

QUESTIONS PRESENTED.

The questions presented by this Petition are:

(1) May a person, firm or corporation make a grant and then invoke the power of a court to repudiate their grant and construe an exception or reservation so as to destroy that which they granted?

(2) When the issue is as to where the boundary lines of a parcel of land are located can a private map be used to set aside, contradict and

be in conflict with a United States Land patent, Government Field Notes and Map?

(3) When a case is tried to the Court without a jury can incompetent evidence, admitted over proper objection, be considered as evidence of the facts it tends to prove?

(4) Can a finding, or judgment, based upon incompetent evidence, properly objected to, be the basis for such finding or judgment?

(5) When a trial Court actually makes a ruling against a plea of Res Judicata, and nothing else appears in the record to the contrary, is not such a finding clearly erroneous and wrong because of no evidence to support said finding?

(6) In an action for specific performance of a contract is not the question "Has the seller actually delivered the thing he agrees to sell" part of the GIST of said action?

(7) When there is no legal evidence in the record that a deed was DELIVERED, is petitioner bound by a "reservation" contained in a recorded deed, when recordation in the State is not considered delivery?

(8) May a national trust and savings association hold real property, or a species thereof, for more than five years either directly or indirectly in violation of the McFadden Act, Branch Bank Legislation, U. S. Code, Annotated, title 12, Section 26 of an Act dated February 25, 1927?

REASONS FOR GRANTING THE WRIT.

Question (1).

The Circuit Court of Appeals (Tr. 2185) erred when it only considered Section 1069 of the Civil Code of California relative to reservations to be interpreted in favor of the grantor, and did not consider statutes *in pari materia* so that said construction would give full force and effect to each statute, or section.

Section 3522 of the California Civil Code provides

> "one who grants a thing is presumed to grant whatever is essential to its use"

and Section 2514 of the same Code provides

> "one must use his own right as not to infringe upon the right of another."

The Circuit Court of Appeals violated the rule of law of the Supreme Court of California in the case of *Cave v. Crafts,* 53 Cal. 153:

> "that when a party grants a thing, he by implication grants whatever is incident to it and necessary to its beneficial enjoyment."

Also the case of *County of Los Angeles v. Hannon,* 159 Cal. 37:

> "the presumption being that the grantor intended by his deed to convey *some property.*"

Both the trial Court and the Circuit Court have decided that (Tr. 2182-84) the use of the land by respondents "will destroy whatever value the land has for agricultural purposes" so as the law now stands they have confiscated petitioner's "surface rights" retain her $8,000.00, and under the construction of Sec.

3522, above, she received nothing for her money, and respondents retain all the land they sold her, as well as her money.

Under the Conformity to Practice Act, Sections 724-725, Chapt. 18, Title 28 U. S. C. A., the Circuit Court of Appeals' decision is in conflict with the Court of last resort of the State of California appertaining to a "rule of property."

In the case of *Lang v. Waters,* 156 Cal. 142, 103 Pacific 889:

> "where there is a description in a deed, followed by an exception which is uncertain, the exception may be VOID FOR UNCERTAINTY, but the description will stand. The granting part of the deed is not avoided by a defect in the exception; but the exception itself becomes ineffectual thereby, and the grant remains in force."

And in the case of *Tennant v. John Tennant Memorial Home,* 167 Cal. 570, 140 Pacific 242, that the right to acquire and possess property * * * includes the right to impose upon the grant of such estate any reservation or condition which the grantor may see fit to place in the grant. The only limitation upon these rights is that they must be exercised in a way *not forbidden by law.*

Section 1441 of the Civil Code of California provides

> "a condition in a contract, the fulfillment of which is impossible or unlawful, within the meaning of the article on the object of contracts, or which is REPUGNANT TO THE NATURE OF THE

INTEREST CREATED BY THE CONTRACT, IS VOID."

And Section 3510 of the same Code provides that "when the reason of a rule ceases, so should the rule."

Question (2).

The Circuit Court of Appeals erred in sustaining the trial Court (Tr. 2168) in permitting a private map to be used to overthrow and contradict a United States Land Patent and said decision is in conflict with an unbroken line of decisions of this Honorable Court and particularly the case of *Cragen v. Powell,* 128 U. S. 691, 32 L. Ed. 566:

> "whether the survey is erroneous, or should give way to the private survey, is a question which was not within the province of the Court below * * * the correction of these mistakes has not been delegated to the judiciary."

Also the case of *Haydee v. Dufresne,* 58 U. S. 23, 15 L. Ed. 115:

> "when the land department has once made and approved a governmental survey of public lands (the plats, maps, field notes and certificates all have been filed in the proper office) and has sold or disposed of such lands, the Courts have power to protect the private rights of a party who has purchased, in good faith against the interferences or appropriations of corrective surveys."

Also the case of *Russell v. Maxwell Land Company,* 158 U. S. 253, 39 L. Ed. 971:

> "a survey made by the proper officers of the United States, and confirmed by the land department, is not open to the challenge by any collateral attack in the Courts. And in the nature of things a survey made by the Government must be held conclusive against collateral attack in controversies between individuals."

The Court's ruling is further against the California cases of *Weaver v. Howatt,* 161 Cal. 77 and 171 Cal. 302, and the additional U. S. case of *Whiteaker v. McBride,* 197 U. S. 512.

Question (3).

The Circuit Court of Appeals erred when it did not follow the rules of evidence of the highest California Court relative to the admissibility of evidence and conflicts with Rule 43 (a) of the Rules of Civil Procedure for the District Courts of the United States (Act June 19, 1934, Chap. 651) and the case of *E. I. Du Pont Co. v. White,* 3rd Circuit, 8 Federal (2d) 5, and *Western v. Ammann,* 3rd Circuit, 296 Federal 453.

The Circuit Court's ruling relative to admissibility of a map to show the proper boundaries of the "Brass Ranch" as being different from the quarter-quarter section described in the certified copy of a deed violates the rule of law contained in the California Decisions of *Joyce v. Tomasini,* 168 Cal. 234, 142 Pacific 67:

> "evidence may be introduced to identify the land"

and *McKevitt v. Sacramento,* 55 Cal. App. 117, 203 Pacific 132:

"evidence is admissible to apply the description contained in the contract to the part of the surface of the earth which is the subject matter of the agreement."

Also:

Fitzimmons v. Atherton, 162 Cal. 630;
Burke v. McCowen, 115 Cal. 481;
Reed v. Murray, 95 Cal. 48.

Question (4).

The Circuit Court of Appeals erred (Tr. 2166 and 2167) in sustaining a finding relative to an alleged agreement of February 28, 1931, because there is no evidence in the record to sustain said finding.

(a) The alleged "escrow instructions" was not an accepted legal contract or a valid escrow and violated Section 1057 of the Civil Code of California:

"a grant may be deposited by the grantor with a third person to be delivered on performance of a condition * * * while in the possession of a third person and subject to condition it is called escrow;"

said document was not deposited with a disinterested third person and violated the rule of *Elliott v. Title Insurance Company,* 64 Cal. App. 508; *Security First National Bank v. Clark,* 8 Cal. App. (2d) 712 and *Holland v. McCarthy,* 173 Cal. at 597:

"a deposit where there is no prior contemporaneous contract of sale of which the delivery of a deed was to be the consummation is NOT an ESCROW."

There was no other agreement of sale offered in evidence on behalf of the respondents. (Tr. 2029, 2031.)

(b) The Court erred in sustaining a finding relative to the Statute of Limitations (Tr. 2169) as the record evidence is against the finding (Tr. 1139-1143) and nowhere else in the record does anything else appear.

(c) The Court erred relative to rule of law on "agreed boundary" and is in conflict with the undisputed line of cases in California, which appear in the case of *Wilder v. Nicolus,* 50 Cal. App. 776, that

> "construction of a fence, and acquiescence in its existence for many years does not establish the true boundary line in the absence of an agreement that the fence was on the true line."

(d) The Court committed error of law when it permitted letters and telegrams by and between respondents and their agents to be admitted in evidence (Tr. 1338-1340) and violated decisions of this Honorable Court.

> *Title Insurance Company v. Guardiola,* 129 U. S. 642:
>
> "it is too clear for discussion that these letters written to plaintiff by their own agent * * * were incompetent to prove the facts recited in the letter against third persons."

Also:

Freeborn v. Smith, 69 U. S. 176;

Dwyer v. Dunbar, 72 U. S. 318, 18 L. Ed. 489; and

U. S. v. Conway, 129 U. S. 38.

The findings are "clearly erroneous" under Rule 52 (a), Federal Rules of Civil Procedure.

The credibility rule did not apply to depositions of ten (10) witnesses whose testimony was by DEPOSITION and the Appellate Court was not bound by the customary credibility rule because the trial Court was not the sole judge of the witnesses' credibility because it did not see the witnesses on the stand.

The Courts of the United States will follow state decisions upon questions of evidence, as in such cases the local rules of evidence are essentially rules of property as well.

Hunicutt v. Peyton, 102 U. S. 333, 26 L. Ed. 113;

Clement v. Parker, 125 U. S. 309, 31 L. Ed. 721;

Ayers v. Watson, 137 U. S. 584, 34 L. Ed. 803.

The case of *Great Western Power Company v. Pillsbury,* 170 Cal. 180, 149 Pac. 35:

> "The claim that a finding of a court is without support in evidence presents a QUESTION OF LAW."
>
> "when there is no evidence, whatever, the question presented is one of law and subject to review by direct attack on a writ of certiorari."

Question (5).

The Appellate Court erred relative to the affirmative defense of *res judicata* (Tr. 2172-2179). The causes of action were different and the issue had never been litigated and determined. The agreement in issue on behalf of the petitioner was dated February 25, 1937, and was only admitted into evidence in the Santa Bar-

bara action for "identification" and when said agreement was introduced in the lower Court respondents kept it out of the record because in that case it was incompetent, irrelevant and immaterial.

Matters and issues withdrawn or withheld from consideration either by stipulation or otherwise are not adjudicated.

McComb v. Frink, 149 U. S. 629;
Miller and Lux, 180 Cal. 38;
S. P. v. Edmonds, 168 Cal. 415;
Cromwell v. Sacramento County, 94 U. S. 351;
Davis v. Brown, 94 U. S. 423;
Roberts v. N. P. Ry., 168 U. S. 1, 27, 28, 29.

Question (6).

The Circuit Court of Appeals erred (Tr. 2179) when it decided that in a specific performance action one could not show where the boundaries of the land purchased actually are for the purpose of showing that the seller has not delivered what he actually sold to the purchaser.

The gist of the action is (a) did the parties enter into a contract? (b) was there a valid contract? (c) what did the parties contract to purchase and sell? and (d) was there a delivery of that for which said parties contracted to buy and sell?

There is no question but what the record shows that the contract was for the BRASS RANCH.

The Circuit Court's decision is against the leading case in California of *Towle v. Carmelo Land Co.,* 99 Cal. 397, and an unbroken line of decisions supporting said rule, which is:

"That it is competent for the plaintiff in the action for SPECIFIC PERFORMANCE of such agreement * * * to prove by extrinsic evidence the PARTICULAR BOUNDARIES OF THE LAND."

Also in *Joyce v. Tomasini,* 168 Cal. 234, 142 Pac. 67:

"evidence may be introduced to identify the land."

And in *McKevitt v. Sacramento,* 55 Cal. App. 117, 203 Pac. 132:

"evidence is always admissible to apply the description contained in the contract to that part of the surface of the earth which is the subject matter of the agreement."

It is also against the rule of *Diffendorf v. Pilcher,* 116 Cal. App. 270-274:

"parole evidence is ordinarily admissible to show WHAT PROPERTY THE PARTIES INTENDED TO CONVEY * * * a means of ascertaining and identifying the property which is the subject matter of the contract * * * it is apparent that the IDENTIFICATION OF THE LAND at the time the parties entered into the agreement is THE IMPORTANT FACTOR TO BE CONSIDERED."

"It is common practice in the Courts to receive maps, diagrams or sketches for the purpose of giving a representation of objects and places which cannot * * * be described by witnesses, and when proved to be correct or offered in connection with the testimony of witnesses they are ADMISSIBLE AS LEGITIMATE AIDS TO THE COURT."

Hewitt v. U. S., 110 Fed. (2d) 1-8;

Feather River Lumber Co. v. U. S., 30 Fed. (2d) 642;

Silvey v. Harm, 120 Cal. App. 561, 570, where it is desired to show the SITUATION OF PREMISES,

also

Kearney Investment Co. v. G. G. Ferry Co., 198 Cal. 560.

The whole matter should be settled in the action for specific performance; the description should not be left to be corrected by another action for that purpose. (*Bacon v. Leslie,* 50 Kansas 494; *Vail v. Tillman,* 2 Washington 476.)

The trial Court's decision on preliminary questions of fact is often said to be conclusive and the trial Court's ruling cannot be reversed on appeal unless there is an abuse of discretion.

People v. Craig, 111 Cal. 460;

People v. Daily, 135 Cal. 104;

Webster v. San Pedro Co., 101 Cal. 326.

Whether or not it is proper to admit maps, diagrams or the like in any particular case is a question resting in the DISCRETION OF THE TRIAL COURT. (32 *C. J. S.* 637; *Silvey v. Harm,* 120 Cal. App. 561.) In this case the lower Court admitted the maps.

In this case the evidence all shows, without contradiction, that the land to be sold was called the "Brass Ranch" while the certified copy of the deed only shows delivery of a quarter-quarter section. The maps show that the "Brass Ranch" contains more land than

the quarter-quarter section, therefore, if the exception is valid, it only applies under said quarter-quarter section, and not under the additional land contained in the Brass Ranch.

Question (7).

The District Court of Appeal erred in its decision in approving findings relative to "executing" and "delivering" a deed on March 9, 1931. (Tr. 2165-2167 and 2171.) The transcript of record shows to the contrary, their own witness (Tr. 1916-1921) testified he DID NOT DELIVER the deed to petitioner on that date; also the deed was recorded at respondents', and not petitioners', request. (Tr. 1921.)

There is no rule of law in the State of California that the mere "recording" of a deed is "delivery".

Section 1213, California Civil Code, states in part that such recordation

> "is constructive notice of the contents thereof to SUBSEQUENT PURCHASERS and MORTGAGEES."

There is no code provision which provides that the "recording" of a deed with the county recorder is equivalent to "delivery" to the vendee.

There was no proper foundation laid for the admission of a copy of a letter (Ex. "E", Tr. 1707), which is the only evidence of delivery of said deed. This ruling is violative of *Hughes v. Pacific Wharf Co.*, 188 Cal. 210, and *City of Chicago v. Greer*, 9 Wall. 726, 19 L. Ed. 769.

The ruling of the District Court of Appeal is tantamount to holding that incompetent evidence, properly objected to, is sufficient to sustain delivery of a deed.

When the copy of the letter was first introduced in evidence (Tr. 1402-1403) an objection was sustained to its introduction; it was finally permitted to go into evidence, over objection at Tr. 1705-1708. And it further violates the rule of this Court in *Smith v. Shoemaker,* 77 Wall. 630, 21 L. Ed. 717.

Question (8).

The holding of real property, or a species thereof, is VOID and in violation of Section 29 of Title 12, U. S. C. A., and particularly violates the rule of law in *Baker v. Schofield,* 221 Fed. 332, construing Section 5137, R. S. (4):

> "no such association shall hold the possession of any REAL ESTATE under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than FIVE YEARS."

It is also against the decision of this Honorable Court in the case of *National Bank v. Matthews,* 98 U. S. 62, wherein it was said:

> "The objects of the restrictions are threefold. It was to keep the Capital of the banks flowing in the daily channels of commerce; to deter them from embarking in hazardous real estate speculation; and to prevent the accumulations of large masses of property in their hands to be held as it were, in mortmain."

WHEREFORE, it is respectfully submitted that the writ should be granted.

Dated, Sacramento, California,
November 9, 1942.

ROY LEON DAILY,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am attorney for the Petitioner in the above entitled cause, and that in my judgment the foregoing Petition is well founded in law and fact, and that said Petition is not interposed for delay.

Dated, Sacramento, California,
November 9, 1942.

ROY LEON DAILY,
Attorney for Petitioner.